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Cardigan Guards Sdn Bhd v Kerajaan Malaysia

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 12ANCVC-16–01 OF 2014
SM KOMATHY JC
19 MAY 2014

C *Contract — Construction — Formation of clause — Parties entered into contract for security guard services — Clause in contract stipulated that payment could be deducted an hour for absent guards — Whether contract valid and enforceable — Whether in breach of provisions under s 75 of the Contracts Act 1950*

D

This was an appeal by the defendant against the decision of the sessions court judge in declaring that the clause in a contract entered between the defendant and the plaintiff was void by reason of breach of s 75 of the Contracts Act 1950 ('Act'). The defendant had appointed the plaintiff to provide security guard services for Hospital Kulim at the rate of RM4.30 per hour for a period of two years commencing from 1 June 2010 to 1 June 2012 at the total contract price of RM1,107,439. It was an express term of the contract that the plaintiff was to provide guard services 24 hours a day. Clause 4.2(d) of the said contract permitted the defendant to deduct RM8.60 an hour for the payment of absent guards. Based on the records of attendance book maintained at the Hospital, the defendant deducted a sum of RM149,672.68 from the payment due to the plaintiff. This caused to plaintiff to commence an action in the sessions court seeking, inter alia, for a declaration that cl 4.2(d) of the contract was invalid and unenforceable as it was a penalty and was in breach of s 75 of the Act; and a refund of the monies deducted pursuant to the said clause.

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Held, allowing the appeal:

H (1) Section 75 of the Act merely declared the law that notwithstanding any fixed sum stipulated in the contract to be payable in case of breach, the court would award the innocent party only reasonable compensation not exceeding the amount stipulated in the contract. The stipulated sum would act as a ceiling to the maximum limit that could be awarded as compensation. The fixed sum in a contract could not be awarded unless the court was satisfied that it was a genuine pre-estimate and reasonable compensation for the loss and damage suffered by the innocent party. A party who had not suffered any loss or damage could not claim compensation simpliciter under this section. In cases where the extent of the actual loss or damage suffered by the innocent party was incapable of

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proof or could not be proved, s 75 of the Act would make it permissible for the party to claim the fixed sum if he could satisfy the court that it was a genuine pre-estimate and reasonable compensation (see paras 14(a), (b), (c), (d), (e)).

(2) Clause 4.2(d) did not become null and void for breach of s 75 of the Act merely because it provided that the defendant could deduct a sum of RM8.60 an hour for absent guards from the payments due to the plaintiff. It could not be gainsaid that it would be difficult to assess the loss and damage suffered by the defendant when the plaintiff's security guards failed to report for duty at the hospital. The defendant would inevitably have faced hardship in finding replacement guards. In the circumstances, the question of whether the contract between the plaintiff and the defendant came within the category of cases where the extent of the loss suffered by the defendant was incapable of assessment; and if so, whether the agreed rate of RM8.60 was a genuine pre-estimate and was reasonable compensation for the loss and damage suffered by the defendant could only be determined after the adduction of evidence at the trial (see para 15).

[Bahasa Malaysia summary

Ini adalah rayuan oleh defendan terhadap keputusan hakim mahkamah sesyen dalam mengisytiharkan bahawa klausa dalam kontrak yang dimasuki di antara defendan dan plaintif adalah batal atas alasan kemungkiran terhadap s 75 Akta Kontrak 1950 ('Akta'). Defendan telah melantik plaintif untuk memberikan khidmat pengawal keselamatan untuk Hospital Kulim pada kadar RM4.30 sejam untuk tempoh selama dua tahun bermula dari 1 Jun 2010 hingga 1 Jun 2012 pada jumlah kontrak keseluruhannya sebanyak RM1,107,439. Adalah terma nyata kontrak bahawa plaintif hendaklah memberikan khidmat kawalan 24 jam sehari. Klausa 4.2(d) kontrak tersebut membenarkan defendan untuk menolak RM8.60 sejam untuk bayaran terhadap pengawal yang tidak hadir. Berdasarkan rekod buku kehadiran yang diselenggara di hospital, defendan menolak sejumlah RM149,672.68 daripada bayaran yang harus dibayar kepada plaintif. Ini menyebabkan plaintif memulakan tindakan di mahkamah sesyen memohon, antara lain, untuk perisytiharan bahawa klausa 4.2(d) kontrak adalah tak sah dan tidak boleh dikuat kuasa kerana ia adalah penalti dan adalah dalam kemungiran terhadap s 75 Akta; dan bayaran balik wang yang ditolak berikutan klausa tersebut.

Diputuskan, membenarkan rayuan:

(1) Seksyen 75 Akta hanya mengisytiharkan undang-undang bahawa meskipun apa-apa jumlah tetap yang ditentukan di dalam kontrak akan dibayar jika berlaku kemungkiran, mahkamah akan mengawardkan pihak yang tidak bersalah hanya pampasan yang munasabah tidak melebihi jumlah yang ditentukan di dalam kontrak. Jumlah yang

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ditentukan akan bertindak sebagai had kepada had maksimum yang boleh diawardkan kecuali mahkamah berpuas hati bahawa ia adalah pra anggaran yang tulen dan pampasan yang munasabah untuk kerugian dan ganti rugi yang dialami oleh pihak yang tidak bersalah. Pihak yang tidak mengalami kerugian atau ganti rugi tidak dapat menuntut pampasan *simpliciter* di bawah seksyen ini. Dalam kes-kes di mana takat kerugian sebenar atau ganti rugi yang dialami oleh pihak yang tak bersalah tidak ada bukti atau tidak boleh dibuktikan, s 75 Akta akan membenarkan untuk pihak menuntut jumlah tetap tersebut jika dia boleh memuaskan pihak mahkamah bahawa ia adalah pra anggaran yang tulen dan pampasan yang munsabah (lihat perenggan 14(a), (b), (c), (d), (e)).

(2) Klausa 4.2(d) tidak menjadi tak sah atau batal untuk kemungkiran terhadap s 75 Akta hanya kerana ia memperuntukkan bahawa defendan boleh menolak jumlah sebanyak RM8.60 sejam untuk ketidakhadiran pengawal keselamatan daripada bayaran yang kena dibayar kepada plaintif. Ia tidak dapat disangkal bahawa ia adalah agak sukar untuk menaksir kerugian dan ganti rugi yang dialami oleh defendan apabila pengawal keselamatan plaintif gagal untuk melaporkan diri untuk bekerja di hospital. Defendan tidak dapat mengelak daripada menghadapi kesukaran dalam mendapatkan penggantian pengawal. Dalam keadaan ini, persoalan sama ada kontrak di antara plaintif dan defendan termasuk dalam kategori kes-kes di mana takat kerugian yang dialami oleh defendan tidak dapat ditaksirkan; dan jika begitu, sama ada kadar yang dipersetujui sebanyak RM8.60 adalah pra anggaran yang tulen dan pampasan yang munasabah untuk kerugian dan ganti rugi yang dialami oleh defendan hanya boleh ditentukan selepas aduksi keterangan pada masa perbicaraan (lihat perenggan 15).]

Cases referred to

Arab Malaysian Corp Builders Sdn Bhd & Anor v ASM Development Sdn Bhd [1998] 6 MLJ 136, HC (refd)

Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 4 MLJ 445; [2009] 4 CLJ 569, FC (folld)

Lebby Sdn Bhd v Tan Keng Hong & Anor [2000] 1 AMR 15, HC (folld)

Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89, PC (folld)

Oil & Natural Gas Corp Ltd v Saw Pipes Ltd AIR (2003) SC 2629 (refd)

Reliance Shipping & Travel Agencies v Low Ban Siong [1996] 2 MLJ 543, CA (refd)

SS Maniam v The State of Perak [1957] 1 MLJ 75 (refd)

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817; [1995] 2 CLJ 373, HC (folld)

Syarikat Ong Yoke Lin Sdn Bhd v Giant Cash & Carry Sdn Bhd & 3 Ors [2000] MLJU 519; [2000] 4 CLJ 757; [2000] 4 AMR 4982, HC (folld)

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Yap Yew Cheong & Anor v Dirga Niaga (Selangor) Sdn Bhd [2005] 7 MLJ 660, HC (folld)

Legislation referred to

Contracts Act 1950 s 75
Contracts Act 1872 [IND] s 74
Rules of Court 2012 O 14A

CJ Siew (Jeannette Tan with him) (Douglas Yee) for the plaintiff.
Fazilah bt Mansur (Federal Counsel, Attorney General's Chambers) for the defendant.

SM Komathy JC:

[1] This is an appeal by the defendant, the Government of Malaysia, against the decision of the Kuala Lumpur Sessions Court judge given on 22 November 2013 declaring cl 4.2(b) in a contract entered between it and the plaintiff, null and void for breach of s 75 of the Contracts Act. The application was made by the plaintiff pursuant to O 14A of the Rules of Court 2012 ('the ROC').

BRIEF FACTS

[2] The factual matrix to this case is as follows. By a contract No KKM (KS-Kulim) 73/2010 dated 5 August 2010 ('the contract') made between the defendant and the plaintiff, the defendant appointed the plaintiff to provide security guards services ('guard services') for Hospital Kulim at the rate of RM4.30 per hour for an unarmed guard for a period of two years commencing from 1 June 2010–1 June 2012 at the total contract price of RM1,107,439 (inclusive of 5% service tax of RM52,735.20) subject to the terms and conditions contained therein. It was an express term of the contract that the plaintiff was to provide guard services 24 hours a day divided into three shifts, and 14 guards for every shift.

[3] Clause 4.2(d) of the contract permitted the defendant to deduct RM8.60 an hour for absentee guards from the payments due to the plaintiff for services rendered. It reads:

> Dalam keadaan Syarikat tidak dapat menyediakan atau menempatkan bilangan pengawal yang telah ditetapkan atau kegagalan pengawal menghadirkan diri semasa bertugas maka Kerajaan boleh memotong Ringgit Malaysia: Lapan Ringgit Enam Puluh Sen Sahaja (RM8.60) bagi tanpa senjata setiap satu jam atau sebahagian darinya bagi satu orang.

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[4] Based on the records of attendance book maintained at the said hospital, the defendant acting under the aforesaid clause had deducted a sum of RM149,672.68 from the payments due to the plaintiff.

[5] On 21 May 2013, the plaintiff commenced the present action seeking, inter alia, for a declaration that upon a true construction of cl 4.2(d), it was invalid and unenforceable as it was a penalty and was in breach of s 75 of the Contracts Act 1950 ('the Contracts Act'). It therefore sought the refund of the monies deducted pursuant to the said clause. In its defence, the defendant disputed the position taken by the plaintiff and maintained that the clause was valid and enforceable.

[6] The plaintiff then filed the present application under O 14A of the ROC seeking the determination of the validity of cl 4.2(b) as a preliminary issue. The question of law/construction sought was whether on a true and proper construction of cl 4.2(d), it was unlawful and/or unenforceable for contravention of s 75 of the Contracts Act. If the answer was in the affirmative, whether the deduction of the RM149,672.68 by the defendant from the payments due to the plaintiff was unlawful.

THE LAW

[7] Section 75 of the Contracts Act stipulates:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

[8] Section 75 of the Contracts Act has been the subject of numerous judicial pronouncements. The scope and meaning of this provision has been considered in several leading decisions, including *SS Maniam v The State of Perak* [1957] 21 MLJ 75, *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89(PC), *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 373 (FC), *Reliance Shipping & Travel Agencies v Low Ban Siong* [1996] 2 MLJ 543 (CA) and *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445; [2009] 4 CLJ 569.

[9] In *Linggi Plantations*, Lord Hailsham in explaining the scope of s 74 of the Indian Contracts Act (which is in pari materia with s 75 of the Malaysian Contracts Act) stated (at p 92):

> Section 74 was intended to cut through the rather technical rules of English law relating to the liquidated damages and penalties, and to apply in substance the

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equitable rule to all cases whether the sum provided in the contract was in substance a penalty or a genuine pre-estimate of the damage likely to be suffered.

[10] In *Selva Kumar*, the Federal Court explained (at p 827):

> But what is far more interesting in that case is that the Indian Supreme Court, when referring to the words in question, ie 'whether or not actual loss or damage was proved to have been caused thereby' stated that the words in question were intended to cover two kinds of contracts. In the first kind, the court would find it very difficult to assess such reasonable compensation. In the second kind, the court could assess such reasonable compensation with settled rules. Such dichotomy of contracts by the Indian Supreme Court represents, in our view, a logical basis for the words in question, words added by the legislature to the section in question without seemingly any thoughtfulness about the desirability of some appropriate limitations thereto. We agree with the Indian Supreme Court's dichotomy of such contracts.
>
> Secondly, we therefore further hold that the words in question, viz 'whether or not actual damage was proved to have been caused thereby', are limited or restricted to those cases where the court would find it difficult to assess damages for the actual damage or loss, as distinct from or opposed to all other cases, when a plaintiff in each of them will have to prove the damages or the reasonable compensation for the actual damage or loss in the usual ways.

[11] In *Reliance Shipping*, Siti Norma Yaakob JCA, in delivering the judgment of the Court of Appeal, referred to *Selva Kumar* and said (at p 547):

> The recent judgment of the Federal Court in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, gives a complete picture of how s 75 is to be interpreted and after going through all the authorities including those cited above, Peh Swee Chin FCJ concluded that the qualifying words in s 75 'whether or not actual damage or loss is proved to have been caused thereby' are limited or restricted to those cases where the court would find it difficult to assess damages for the actual damage or loss as opposed to all other cases, where a plaintiff in each of them will have to prove the damages or the reasonable compensation for the actual damage or loss in the usual ways.

[12] The Federal Court in *Johor Coastal*, was asked to reconsider its decision in *Selva Kumar*. There, the appellant relied on an decision of the Indian Supreme Court in *Oil & Natural Gas Corp Ltd v Saw Pipes Ltd* AIR (2003) SC 2629 to contend that in cases falling within s 75, the innocent or aggrieved party is not required to prove actual loss or damage before he can claim as compensation the sum stipulated in the contract. In rejecting the argument, Ariffin Zakaria CJM (as he then was) said (at para 35 p 586):

> Upon a close examination, I find that *Oil & Natural Gas* falls in the category of cases where the loss suffered is incapable of assessment. Hence the amount stipulated may be regarded as a genuine pre-estimate of damages and therefore it is recoverable. Further in *Selva Kumar* itself the court recognised that where the court finds it

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A difficult to assess damages as there is no known measure of damages employable, the stipulated sum may be recoverable.

[13] It is apposite to mention here that there are judicial dicta that hold that s 75 should not be limited to cases where damages are difficult to assess. The decision in *Selva Kumar* was not followed in *Lebby Sdn Bhd v Tan Keng Hong & Anor* [2000] 1 AMR 15 (HC), *Yap Yew Cheong & Anor v Dirga Niaga (Selangor) Sdn Bhd* [2005] 7 MLJ 660 (HC), *Arab Malaysian Corp Builders Sdn Bhd & Anor v ASM Development Sdn Bhd* [1998] 6 MLJ 136 (HC) and *Syarikat Ong Yoke Lin Sdn Bhd v Giant Cash & Carry Sdn Bhd & 3 Ors* [2000] MLJU 519; [2000] 4 CLJ 757; [2000] 4 AMR 4982 (HC). This court is bound by the statement of law enunciated by the Federal Court in *Selva Kumar* and *Johor Coastal* on the on the meaning of s 75.

[14] From the authorities discussed above, the following principles may be extracted:

(a) s 75 merely declares the law that notwithstanding any fixed sum stipulated in the contract to be payable in case of breach, the court will award the innocent party only reasonable compensation not exceeding the amount stipulated in the contract;

(b) the stipulated sum acts as a ceiling to the maximum limit that can be awarded as compensation;

(c) the fixed sum in a contract cannot be awarded unless the court is satisfied that it is a genuine pre-estimate and reasonable compensation for the loss and damage suffered by the innocent party;

(d) a party who has not suffered any loss or damage cannot claim compensation simpliciter under this section; and

(e) in cases where the extent of the actual loss or damage suffered by the innocent party is incapable of proof or cannot be proved, s 75 makes it permissible for the party to claim the fixed sum if he can satisfy the court that it is a genuine pre-estimate and reasonable compensation.

[15] Applying the above principles to the present case, it is clear that cl 4.2(d) does not become null and void for breach of s 75 of the Contracts Act merely because it provides that the defendant can deduct a sum of RM8.60 an hour for absentee guards from the payments due to the plaintiff. It cannot be gainsaid that in the present instance, it would be difficult to assess the loss and damage suffered by the defendant when the plaintiff's security guards failed to report for duty at the hospital. The defendant would inevitably have faced hardship in finding replacement guards. In the circumstances, the question of whether the contract between the plaintiff and the defendant came within the category of cases where the extent of the loss suffered by the defendant was incapable of

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assessment; and if so, whether the agreed rate of RM8.60 was a genuine pre-estimate and is reasonable compensation for the loss and damage suffered by the defendant, in my judgment, can only be determined after the adduction of evidence at the trial.

[16] In the circumstance, in my view, it was wrong for the sessions judge to have declared the clause null and void per se without hearing evidence from the parties on these issues.

CONCLUSION

[17] For these reasons, I allowed the appeal. I further ordered that the costs of appeal to follow the event in the sessions court.

Appeal allowed.

Reported by Afiq Mohamad Noor